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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Alliance to Protect Nantucket Sound
4 Barnstable Road
Hyannis, Massachusetts 02601

Plaintiff,

v.

Kenneth Salazar, in his official capacity
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240,

Hilary Tompkins, in her official capacity
Solicitor of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240,

Defendants.

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.*, as amended, and the U.S. Department of the Interior's ("DOI") FOIA regulations at 43 C.F.R. Part 2, to challenge the failure of the U.S. Department of Interior's Office of the

Solicitor ("Office of the Solicitor") to respond to and disclose documents to Plaintiff's July 18, 2011, FOIA request.

2. Plaintiff seeks declaratory relief that Defendants are in violation of FOIA for failing to fulfill Plaintiff's request for records.

3. Plaintiff seeks injunctive relief that Defendants immediately and fully comply with Plaintiff's request under FOIA.

JURISDICTION AND VENUE

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702.

5. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff the ALLIANCE TO PROTECT NANTUCKET SOUND ("APNS") is a nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound. APNS was formed in 2001 in response to Cape Wind Associates, LLC's ("CWA") proposal to build a wind energy plant in Nantucket Sound. APNS's goal is to protect Nantucket Sound in perpetuity.

7. APNS requested documents from DOI concerning communications between CWA, its representatives, the State of Massachusetts, any pro-Cape Wind group or individual and any agent or official of the Office of the Solicitor regarding CWA's proposal to construct and

operate a 468 MW large-scale wind energy plant off the coast of Massachusetts that would be comprised of 130 wind turbines. If constructed, this would be the largest offshore wind energy plant in the world.

8. APNS is harmed by the Office of the Solicitor and DOI's failure to comply with its FOIA request. This failure hinders APNS from obtaining information necessary to meaningfully participate in agency actions and defend against a proposal with potentially significant public impacts and impacts to the Plaintiff's interests. APNS has challenged the decision of the Secretary to issue a lease to Cape Wind in one of five federal lawsuits by different plaintiffs against the proposed energy plant. *Public Employees for Environmental Responsibility, et al. v. Beaudreau, et al. and Cape Wind Associates, LLC*; *Alliance to Protect Nantucket Sound, et al. v. Salazar, et al. and Cape Wind Associates, LLC*; *Town of Barnstable Massachusetts v. Salazar, et al. and Cape Wind Associates, LLC*; *Martha's Vineyard/Dukes County Fisherman's Assoc., et al. v. Salazar, et al. and Cape Wind Associates, LLC*; *The Wampanoag Tribe of Gay Head (Aquinnah) v. Beaudreau, et al. and Cape Wind Associates, LLC*, 1:10-cv-01067-RMU-DAR (consolidated).

9. Defendant KENNETH SALAZAR is Secretary of DOI. He is sued in his official capacity. DOI is an agency within the meaning of 5 U.S.C. § 552(f) and 43 C.F.R. § 2.3(b). DOI is the federal agency with oversight responsibility for the Office of the Solicitor. DOI is responsible for administrative appeals of FOIA requests to all bureaus and offices within DOI.

10. Defendant HILARY TOMPKINS is the Solicitor for the Office of the Solicitor. She is sued in her official capacity. The Office of the Solicitor is an office within DOI, which is an agency within the meaning of 5 U.S.C. § 552(f) and 43 C.F.R. § 2.3(b). The Office of the

Solicitor is the office within DOI with possession and control of the requested records and is responsible for fulfilling Plaintiff's request for documents made pursuant to 5 U.S.C. § 552.

STATEMENT OF FACTS

STATUTORY FRAMEWORK

11. FOIA, 5 U.S.C. § 552 *et seq.* and 43 C.F.R. Part 2, requires federal agencies to release requested records to the public unless a specific statutory exemption applies.

12. Once a federal agency receives a FOIA request, the agency must respond to the requesting party within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i), 43 C.F.R. § 2.12. The response must contain, at a minimum, the agency's determination of whether to fulfill the request or decline to release the documents under a specific exemption, and notice of the requester's right to appeal the agency's determination. *Id.*

13. In the event a FOIA decision is appealed, an agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination to either uphold the denial or to release the withheld records. 5 U.S.C. § 552(a)(6)(A)(ii), 43 C.F.R. § 2.32(a).

14. If a decision on an appeal is not received within 20 workdays, the appealing party has a right to seek judicial review in a District Court of the United States. 5 U.S.C. § 552(a)(4) and (6), 43 C.F.R. § 2.32(c).

15. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide both notice of the delay and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

16. This Court has jurisdiction, upon receiving a complaint, to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint." 5 U.S.C. § 442(a)(4)(B).

APNS'S FOIA REQUEST TO THE OFFICE OF THE SOLICITOR

17. Plaintiff filed a FOIA request directed to: 1) the Office of the Solicitor; 2) DOI's Office of the Secretary; and 3) DOI's Office of the Director of the Bureau of Energy Management, Regulation and Enforcement ("BOEMRE")¹ by letter dated July 18, 2011. The request sought the following records and documents:

all documents of *any* written or oral communications between Cape Wind Associates, LLC ("Cape Wind") and its representatives, the State of Massachusetts, or any pro-Cape Wind group or individual and any officials serving DOI's Office of the Secretary, Office of the Assistant Secretary of Land and Minerals Management, *Office of the Solicitor* and the Office of the Director of the Bureau of Energy Management, Regulation and Enforcement regarding the Cape Wind Project. "All records" encompass any documents, including correspondence, meeting minutes, memoranda, emails, spreadsheets, reports, appointments, meeting schedules or other records regardless of form. The Alliance seeks all communications from February 25, 2011 to the date of DOI's response to this request (emphasis added).

¹ On October 1, 2011, BOEMRE was reorganized and split into two independent entities: the Bureau of Ocean Energy Management ("BOEM") and the Bureau of Safety and Environmental Enforcement ("BSEE"). As a result, on November 1, 2011, APNS's FOIA request was assigned to BSEE.

18. BOEMRE and the Office of the Secretary both sent letters acknowledging receipt of APNS's July 18, 2011 FOIA request on July 21, 2011 and July 29, 2011, respectively. The Office of the Solicitor failed to respond.

19. On September 7, 2011 and November 17, 2011, APNS received additional correspondence from the Office of the Secretary confirming that the Secretary's Office had processed APNS's July 18, 2011, FOIA request. With its November 17, 2011, correspondence, the Office of the Secretary released 172 pages of responsive documents. Similarly, on November 21, 2011, January 5, 2012, January 27, 2012 and February 23, 2012, the Bureau of Safety and Environmental Enforcement ("BSSE") (formerly part of BOEMRE) corresponded with APNS to clarify and respond to its July 18, 2011, FOIA request. With its February 23, 2012 response, BSSE provided 58 responsive documents. The Office of the Solicitor, however, has not responded to APNS's July 18, 2011, FOIA request.

20. On October 6, 2011, APNS sent another letter to the Office of the Solicitor following-up on its July 18, 2011, FOIA request. In its correspondence, APNS stated that it had not received a response from the Office of the Solicitor to its FOIA request within the 20 working days, as required under 43 C.F.R. § 2.12. APNS provided the Office of the Solicitor a deadline of October 28, 2011 to respond to its October 6 letter or it would consider the Office of Solicitor's inaction a denial and file an appeal.

ADMINISTRATIVE APPEAL OF APNS

21. On November 8, 2011, Plaintiff filed an administrative appeal with DOI challenging the Office of Solicitor's failure to respond to its July 18, 2011, FOIA request or

October 6, 2011, follow-up correspondence. In its appeal, APNS stated that it was treating the Office of the Solicitor's failure to respond as a denial.

22. DOI's Office of Appeals responded on November 17, 2011 to the administrative appeal by issuing a letter that acknowledged receipt of the appeal and assigned it "Appeal Number 2012-016."

23. Pursuant to 43 C.F.R. § 2.32, a response to APNS's appeal was due within 20 working days, or by December 19, 2011 (accounting for federal holidays). On December 29, 2011, Plaintiff sent a letter to the DOI Office of Appeals explaining the need for timely action and stating that APNS would treat failure by the Office of Appeals to issue a decision by January 18, 2012 as a denial for purposes of judicial review.²

24. On June 7, 2012, seven months later after APNS filed its November 8, 2011, FOIA appeal, APNS received a response from DOI regarding the status of its appeal. The June 7, 2012, letter stated that the Office of the Solicitor failed to respond to the Alliance because it assumed the Office of the Secretary would respond on its behalf. The letter further stated that the "Department [DOI] will remand this matter to SOL [the Office of the Solicitor] for action. SOL is directed to advise you [APNS] within 15 workdays from the date of this letter [by June 28, 2012] whether it will comply with your FOIA request (i.e. grant or deny the request (or any portion thereof)), with a copy of the response to this Office."

² This is the second time APNS has found it necessary to sue DOI for failure to respond to a FOIA request. On May 6, 2010, APNS sued DOI for failing to adequately respond to a FOIA request dated August 28, 2009 and subsequent appeal of January 20, 2010. *Alliance to Protect Nantucket Sound v. Salazar, et al.*, No. 10-cv-00731 (D.C. Cir. 2010). DOI inaccurately claimed that it had no responsive documents to APNS's request and then misrepresented the scope of APNS's appeal. On March 8, 2011, APNS stipulated to voluntary dismissal of its lawsuit after DOI agreed to settle the case and provide APNS with documents responsive to its FOIA request.

25. The Office of the Solicitor failed to comply with the directive of the June 7, 2012, letter. To date, the Office of the Solicitor has not contacted APNS regarding whether it will comply with APNS's July 18, 2011, FOIA request.

26. On October 1, 2012, a representative for APNS contacted Ms. LaRima Lane, the contact listed in DOI's June 7, 2012, letter to determine if the June 7, 2012, letter was a final determination by the agency for purposes of judicial review. APNS was unsuccessful in reaching Ms. Lane.

27. On October 4, 2012, Ms. Lane and a representative for APNS spoke regarding the June 7, 2012, letter and the failure of the Office of the Solicitor to comply with the letter's mandate. Ms. Lane indicated she would review the June 7, 2012, letter and call back "within 10 minutes." Ms. Lane has not returned APNS's call.

28. On October 10, 2012, APNS sent DOI a letter memorializing its call with Ms. Lane and informing the agency that although its June 7, 2012, letter indicated that the correspondence completed the response of the DOI Office of Appeals, the letter failed to advise APNS of its right to judicial review as required under 43 C.F.R. § 2.31(b)(3). APNS further informed DOI that its October 10, 2012, letter served as notice that APNS was treating the Office of Appeal's failure to respond as a final action for purposes of judicial review and litigation.

29. APNS hereby seeks judicial review of the DOI Office of the Solicitor's failure to respond to the July 18, 2011, FOIA request and the Office of Appeal's failure to fully respond to APNS's November 8, 2011, appeal.

CAUSE OF ACTION

VIOLATION OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. §§ 552 *et seq.*

30. Plaintiff realleges and incorporates the allegations contained in paragraphs 1 through 29 above.

31. By failing to provide Plaintiff with records responsive to its July 18, 2011, FOIA request, Defendant Office of the Solicitor has effectively denied Plaintiff's right to this information under FOIA.

32. By denying Plaintiff the requested relief of its November 8, 2011, administrative appeal, Defendant DOI has denied Plaintiff's right to the records requested on appeal under FOIA.

33. By failing to release all responsive documents to Plaintiff's July 18, 2011, FOIA request and November 8, 2011, FOIA appeal, the DOI's Office of the Solicitor continues to violate Plaintiff's legal right to access responsive records under FOIA.

34. Plaintiffs are entitled to all reasonable costs of litigation, including attorney fees, pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays to this Court:

- A. Declare that Defendants' failure to provide responsive documents to Plaintiff's FOIA request of July 18, 2011, and FOIA administrative appeal of November 8, 2011 is unlawful;

- B. Order Defendants to promptly provide Plaintiff with copies of the responsive documents sought by Plaintiff's FOIA request of July 18, 2011, and FOIA administrative appeal of November 8, 2011;
- C. Award Plaintiff's costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and
- D. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 19th day of October, 2012.

/s/ Nidhi J. Thakar
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